NO. 22252

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. MEYER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

[illegible]

FILED

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

John C. Meyer and codefendants Virgil D. Kvasnicka and Eugene M. Murphy were indicted on January 12, 1966, for violations of Title 18, United States Code, Section 1243 (fraud by wire); Title 15, United States Code, Section 77c(a) (1), (2) (sale and delivery of unregistered securities by mail); and Title 15, United States Code, Section 77e(c) (offer to sell unregistered securities by mail). Judgment of Conviction against Meyer was entered on May 9, 1966 [R. T. 2456]. [1] Judgment After Study was entered

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[1] "R. T." refers to Reporter's Transcript.

on August 23, 1966 [R. T. 2481]. Meyer's Notice of Appeal was filed on August 23, 1966.

Jurisdiction of the District Court was predicated upon Title 18, United States Code, Section 3231. This Court has jurisdiction under Sections 1291 and 1294 of Title 28, United States Code.

II

STATEMENT OF THE CASE

The sixteen count indictment, filed January 12, 1966, charged Meyer and two codefendants with six counts (Counts One through Six) of devising a scheme to fraudulently obtain money by wire from certain purchasers of fractional interests in certain Oklahome oil and gas leases; five counts (Counts Seven through Eleven) of delivering by mail unregistered securities, namely, fractional undivided interests in certain oil and gas leases, for the purpose of sale and for delivery after sale; three counts (Counts Twelve through Fourteen) of using the mails to sell unregistered securities, namely, undivided interests in oil and gas leases; one count (Count Fifteen) of using the mails to offer to sell an unregistered security, namely, fractional undivided interests in oil and gas leases; and one count (Count Sixteen) of mailing an unregistered security for sale and for delivery after sale.

Meyer was arraigned and entered a plea of not guilty to

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all counts on January 31, 1966. Trial by jury commenced on February 14, 1966 before the Honorable E. Avery Crary, United States District Judge [R. T. 4]. A verdict of guilty on Counts One through Fifteen was returned on April 18, 1966 [R. T. 2428]. Judgment of Conviction against Meyer was entered on May 9, 1966 [R. T. 2456]. On August 23, 1966, Judgment After Study was entered [R. T. 2481], and on that date, appellant filed a Notice of Appeal.

Title 18, United States Code, Section 1343 provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, . . . [shall be guilty of an offense].

The Securities Act of 1933 found in Title 15, United States Code, Section 77q(a) provides in part:

> (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or

communication in interstate commerce or by the use of the mails, directly or indirectly --

(1) To employ any device, scheme, or artifice to defraud, or

(2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

It is further provided in the Securities Act that for the purpose of the statute the term "security" means:

> Any note, stock, . . . bond, debeture, . . . fractional undivided interest in oil, gas or other mineral rights, or in general, any interest or instrument commonly known as 'security'.

III

QUESTIONS PRESENTED

1. Did the trial court commit plain error when it failed to declare a mistrial and sever Meyer's trial from that of his codefendants during the course of trial?

2. Was it a violation of Meyer's constitutional rights to continue the trial in his absence?

3. Were Meyer's rights to a fair trial and to confront witnesses violated by the argument of the prosecution?

IV

STATEMENT OF FACTS

Late in 1962, defendant John C. Meyer met with codefendants Eugene Murphy and Virgil Kvasnicka and suggested a plan to the codefendants for selling fractional interests in oil wells to be drilled by Meyer on his leases [R. T. 1633, 1657]. Meyer told both men that, among other things, he had a Ph. D. in geology from the Colorado School of Mines; he was wealthy; he had been successful in drilling for oil in the past; he was a former Marine officer; he owned producing oil wells all over the world; he owned oil leases in Oklahoma which were on Osage Indian land and were not therefore subject to production controls; that the leases were subdivided into working interests, which could be sold in small units at prices from $250 to $1,000 each, and that

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each well would require $32,000 for drilling [R. T. 1628-9, 1650-2, 1670-3, 2074-100].

Kvasnicka and Murphy agreed to sell these interests in $250 to $1,000 units in return for a 10% commission on each sale and an overriding royalty in certain of the oil leases [R. T. 1633, 2074-6].

Kvasnick and Murphy immediately commenced sales activities, primarily in Idaho, Utah, and California [R. T. 1658, 2074-76, 2095]. In the process, both men repeated the statements made to them by Meyer about Meyer's background and expertise in the oil producing business [R. T. 1670-73, 2074-2090].

To aid Murphy and Kvasnicka in the selling, Meyer provided the information and caused to be prepared a brochure (Government's Exhibit 1A) [R. T. 2189], which contained numerous false statements and misrepresentations.

The false statements in the brochure included:

(a) That there was a high probability of a high-producing well in the Tulsa-Osage Counties area [R. T. 1486];

(b) That the bottom-hole pressure in the area was 1650 pounds per square foot [R. T. 1486];

(c) That maintenance costs were negligible [R. T. 1487, 1490-1];

(d) That oil migrates and replenishes itself in good oil fields [R. T. 1491-2];

(e) That wells in the area produced 20 - 30 barrels per hour [R. T. 1492-4];

(f) That Meyer's well in Illinois produced 5,000 barrels per day [R. T. 1495].

Kvasnicka and Murphy either provided a copy of the brochure or related the misrepresentations contained in it to investors. In addition, Meyer met with many of the purchasers of the oil interests. At these meetings, Meyer assisted the direct selling by making the same misrepresentations he had made to Kvasnicka and Murphy and in the brochure. [2]

In addition to the false statements in the brochure, investors were told by Meyer and his codefendants other facts which were false in the following particulars:

(a) Defendants had no contract to sell oil to Standard Oil of Ohio [R. T. 844-5; 1432-3];

(b) None of the land described in receipts given to investors was conveyed to codefendants Murphy and Kvasnicka by Meyer [R. T. 789-98];

(c) Much of the property described in the receipts given to investors was never leased or owned by any of the defendants

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[2] Meyer met with the following victims and either made the misrepresentations himself or was present when another person made them: Louise Counsemano [R. T. 136, 145-8, 168]; Fred Moore [R. T. 191, 193-202, 211, 219-21, 233]; Mervin Christensen [R. T. 356-7]; Harold Harten [R. T. 400, 406-10]; Thomas Robertson [R. T. 462-5, 468-9, 478-80]; Ed Basteda [515-6]; Billy Shekell [R. T. 562-3]; Della Bettendorf [R. T. 594, 597-8, 616]; Anna King [R. T. 632-46]; Donald McAtu [R. T. 769-70]; Richard Jennings [R. T. 819-21, 835]; Phillip Britton [R. T. 1003-6, 1010-11]; Norma Mooter [R. T. 1078, 1082]; Beverly Leos [R. T. 1118, 1125]; Marjorie Stavenhagen [R. T. 1500, 1510, 1514].

[R. T. 1258-73, 1290-92];

(d) There were only three producing oil wells on the ranch upon which Meyer drilled a well [R. T. 1420] and these wells produced but 5 barrels of oil per day [R. T. 1287-8];

(e) The legal descriptions on the receipts given to investors were entirely inaccurate [R. T. 1304-7, 1311-12];

(f) No oil was ever produced by any wells owned by Meyer in Tulsa and Osage Counties [R. T. 1366-70];

(g) Meyer did not hold a Ph. D. in geology from the Colorado School of Mines [R. T. 1578, 1581, 1606-7];

(h) Meyer was never an officer in the United States Marine Corps [R. T. 1599];

(i) Meyer's income was not so large that for tax purposes he could afford to give away income from oil wells [R. T. 1581, 1597, 1606-7];

(j) Meyer did not record, nor did he intend to record, any assignments of "working interests" with the Tulsa County or Osage County recorders [R. T. 2000-1];

(k) The wells on the Indian land were subject to production controls [R. T. 1286-7].

All of the money from sales of working interests collected by codefendants and others was turned over to Meyer [R. T. 1051, 1176, 1244, 1644, 2040, 2133]. The "working interests" were sold in $250 to $1,000 units; the total amount collected was approximately $140,000 [R. T. 1923, 2167, 1176]. Another $20,000 was collected by Murphy and Kvasnicka from sales of

"overriding royalty interests" [R. T. 1923, 2167]. No purchaser received a return on his money. Meyer did, however, drill one well on a lease owned by him at a cost of $17,000 [R. T. 1346] (not $32,000 as represented). The well never produced oil [R. T. 1365-6]. Also, Meyer refunded money to two or three investors after they had complained to him [R. T. 240, 2164].

At no time were there any registration statements filed with the Securities Exchange Commission by any of the defendants [R. T. 1608-9].

On February 24, 1966, the fourth day of trial, Meyer absented himself from the trial [R. T. 861]. After a brief hearing, the trial continued in Meyer's absence [R. T. 860-938]. The following Monday, another hearing was held in which Meyer's wife and mother, who had previously testified falsely, testified that Meyer fled because he was afraid of getting killed and that he was irrational [R. T. 950-66]. Proof was offered that Meyer was on a helicopter flight from San Bernardino to the Los Angeles International Airport on the morning of February 24, 1968 [R. T. 967]. Meyer's motion for a mistrial was denied [R. T. 974-5, 982, 1618-19].

V

ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN FAILING TO SEVER MEYER'S TRIAL.

Meyer concedes that he was properly joined as a defendant under Rule 8, Federal Rules of Criminal Procedure [A. B. 17]. [3]

At the commencement of trial, Meyer moved for severance under Rule 14 of the Federal Rules of Criminal Procedure [4] on the ground that the codefendants Murphy and Kvasnicka had made statements to the government which would prejudice Meyer [R. T. 24]. The motion was denied [R. T. 48]. The government represented that the statements of neither defendant would be offered into evidence [R. T. 24]. No such statements were introduced by the government. Meyer's motion for severance was never renewed.

Both codefendants, Murphy and Kvasnicka, based their defense on the theory that they were participating innocently and

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[3] "A. B." refers to appellant's brief.

[4] Rule 14. Relief from Prejudicial Joinder. "If it appears that a defendant or the government is prejudiced by joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or the separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

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acting in good faith in reliance upon representations made by Meyer [R. T. 83, 1620-2074, 2074-2154].

The survey of the case law interpreting Rule 14 in Appellant's Brief [A. B. 18-19] and the standard of fairness applied in these cases is accurate. The applicable test under these cases is whether the joint trial is fundamentally fair; that determination turns on the facts of each particular case. United States v. Echeles, 352 F. 2d 892, 896 (7th Cir. 1965).

Also, it is settled that severance rests within the discretion of the trial court, United States v. Brown, 375 F. 2d 310 (D. C. Cir. 1966), cert. denied, 388 U. S. 915 (1957). Absent a showing of a clear abuse of discretion by the trial court, this Court should not disturb the conviction. Opper v. United States, 348 U. S. 84 (1954).

Meyer argues that severe prejudice to him resulted from the trial court's failure to sever his case, and in that connection, asserts three factors.

First, Meyer claims that his codefendants actively prosecuted him in order to persuade the jury that they, too, were victims of appellant's fraudulent scheme [A. B. 20-1].

He relies upon United States v. Valdes, 262 F. Supp. 474 (D. C. P. R. 1967). In Valdes, the District Court granted a pretrial motion for severance on the ground that prejudice would result from one defendant's attempt to blame his codefendant for the commission of the crime. Here, however, Meyer did not urge this as a ground in his motion for severance before trial, or at

any time in the court below. Moreover, research discloses no case in which a failure to sever for this reason was plain error.

On the contrary, the overwhelming weight of authority is expressed by United States v. Cohen, 124 F. 2d 164, 166 (2nd Cir. 1941):

> It is common in cases of joint indictments that there is hostility of some of the defendants to the others and that they will try to save themselves by placing the blame on their associates in the crime. The jury can, and does, weigh the inductment of some defendants to implicate others in determining guilt. We find no error in the disposition of the motion to compel severance and hold that the order denying it should be affirmed.

Accord, Baker v. United States, 329 F. 2d 786 (10th Cir. 1964), cert. denied, 379 U. S. 853 (1964); Sharp v. United States, 195 F. 2d 997 (6th Cir. 1952); Dauer v. United States, 189 F. 2d 343, 344 (10th Cir. 1951), cert. denied, 342 U. S. 898 (1951); Allen v. United States, 91 U. S. App. D. C. 197, 202 F. 2d 329 (D. C. Cir. 1952), cert. denied, 344 U. S. 869 (1952); United States v. Bentvena, 193 F. Supp. 485 (D. C. N. Y. 1960), aff'd., 357 F. 2d 58 (1966), cert. denied, 385 U. S. 815 (1966); United States v. Steffes, 228 F. Supp. 491 (D. C. Mont. 1964).

The policy for rarely granting a severance was summarized in Davenport v. United States, 260 F. 2d 591 (9th Cir. 1958), cert. denied 359 U. S. 909 (1959):

> 'Where two or more defendants are indicted for a joint transaction, it is inadvisable to split up the case into many parts for separate trials, in the absence of very strong and cogent reason therefor.'
>
> * * *
>
> 'A man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats.'

A strong showing of prejudice by the movant is required because, as stated in United States v. Wallace, 272 F. Supp. 838, 841 (D.C. N.Y. 1967):

> [A] defendant's desire for a separate trial must yield to the public interest in avoiding unnecessary duplication and expense and in utilizing available facilities and personnel to best advantage toward assuring speedy trials for all of those accused . . . and the burden is upon the movant to come forward with facts demonstrating that he will be so severely prejudiced by a joint trial that it would in effect deny him a fair trial altogether.

Secondly, Meyer claims that he was prejudiced because the codefendants testified but Meyer did not, and because this fact was adverted to by defense counsel [A. B. 24].

Meyer relies upon De Luna v. United States, 308 F. 2d 140 (5th Cir. 1962), reh. denied, 324 F. 2d 375 (1963), in which comments on a defendant's failure to testify by a codefendant's attorney constituted error. In that case, however, counsel for the codefendant referred directly to De Luna's failure to testify and argued that an honest man is not afraid to take the stand and testify. 5/ No such statements were made in Meyer's trial, and no reference was made to Meyer's silence. Counsel merely said, "He [referring not to Meyer but to the codefendant] brought those receipts in here to you" [R. T. 2297] and "the two defendants here have admitted they sold these interests. They have admitted they made these representations" [R. T. 2337].

These remarks do not refer to Meyer's failure to take the stand, much less constitute "inflammatory and prejudicial" comment. It should be noted that in De Luna, the court emphasized that the comments "were not casual or isolated references; they were integral to Gomez's defense".

The facts here are closer to those in United States v. Parness, 331 F. 2d 703, 705 (3rd Cir. 1964), cert. denied 377 U. S. 993 (1964). Parness, in distinguishing De Luna, limited the latter to the particular facts and procedures followed at that trial, and added:

5/ "Well, at least one man was honest enough and had courage enough to take the stand and subject himself to cross-examination and tell you the whole story. . . . You haven't heard a word from this man [De Luna]." 308 F. 2d at 142.

Under all the circumstances of this case we do not think that the statement that Parness took the witness stand because he had nothing to hide as phrased by his attorney, was outside the limits permitted an advocate in his defense summation. It did not refer to the failure of Grimmett to testify directly or by inference. We cannot fairly hold that it was in violation of appellant's constitutional rights. 6/

Thirdly, Meyer implies that the statements given by Kvasnicka and Murphy to the government prior to trial were prejudicial, even though these statements were not used in the trial [A. B. 18].

This same situation arose in Dauer v. United States, supra. Dauer and another were jointly indicted. Dauer's codefendant had made a written confession in which he tried to vindicate himself at the expense of Dauer. The government announced that it did not intend to use and did not introduce the codefendant's confession. The trial court's denial of the motion to sever was affirmed.

6/ In Parness one defendant testified, and one did not. There was no objection to the charge given below, and no motion for a new trial involving the severance issue. The issue was raised for the first time on appeal. The court went on to state that "the Grimmett defense cannot be excused for not having asked for a mistrial".

B. PROCEEDING WITH THE TRIAL IN MEYER'S ABSENCE WAS PROPER.

Rule 43 of the Federal Rules of Criminal Procedure provides in part that:

> In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.

The purpose of this provision "is to prevent frustration of a trial in progress by the escape or absconding of the defendant". Cross v. United States, 325 F. 2d 629, 631 (D. C. Cir. 1963).

Rule 43 is applicable where, as here, the defendant is on bond. Meyer had a duty to appear at the times appointed by the court, or if he was unable to do so, to communicate with the court or counsel concerning his absence. Meyer did neither. See Diaz v. United States, 223 U. S. 442 (1911).

Meyer's reliance on Johnson v. Zerbst, 304 U. S. 458 (1938) is misplaced. That case involved an invalid waiver of the right to counsel. The requirement that such a waiver must be voluntary and intelligent was emphasized. It does not assert that Rule 43 requires an express waiver of defendant's presence at trial, after trial has begun and the defendant has absconded.

Rule 43 requires a finding that defendant's absence was voluntary. It does not require an express waiver of presence by

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the defendant. If he voluntarily leaves, defendant has impliedly waived his right to be present. State ex. rel. Shetsky v. Utecht, 228 Minn. 44, 36 N. W. 2d 126 (1949); see Phillips v. United States, 334 F. 2d 589 (9th Cir. 1964), cert, denied, 379 U. S. 1002 (1965); Cross v. United States, supra; see also, Diaz v. United States, supra.

Furthermore, Zerbst emphasizes that:

> "The determination of whether there has been an intelligent waiver of the right to counsel must depend, on each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." 304 U. S. at 464.

At Meyer's trial, the court found such an implied waiver. The trial judge rejected Meyer's vague assertions that his life had been threatened and found that Meyer's absence was voluntary. An abundance of evidence supports this finding [R. T. 860-938, 950-974]. This Court will not disturb such a factual determination by the trier of fact. Noto v. United States, 367 U. S. 290 (1961); Glasser v. United States, 315 U. S. 60 (1942).

Moore v. Michigan, 355 U. S. 155 (1957), relied upon by Meyer, is inapposite. There, a 17 year old Negro boy "waived" his right to counsel and pleaded guilty, after the Sheriff had told him that he (the Sheriff) might not be able to protect him.

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[illegible]

Obviously, the boy's fear of attending trial affected his plea of guilty and vitiated his waiver of counsel. The "waiver" in Moore was induced by the police while the defendant was in police custody. Meyer, however, never sought protective custody of the court or of any law enforcement agency, nor did he truthfully advise his own attorney of his disappearance, or the alleged reason for it [R. T. 860-1, 950-66]. Assuming, arguendo, that Meyer was threatened, there are no facts to bring the circumstances of his action within the definition of coercion or duress. [7] Meyer, if believed, chose not to seek protection, but to flee.

Turner v. Louisiana, 379 U. S. 466 (1965) is also distinguishable. It deals with the conduct of prosecution witnesses in influencing the jury outside the courtroom. The arresting officers, who also took a confession from the defendant, ate, conversed, and continuously associated with the jury during the three day trial. Clearly, the probability of prejudice resulting from this activity is great. No such activity was present in the instant case. Compare, Bowles v. Texas, 366 F. 2d 734 (1966).

In any event, the trial court rejected the vague testimony that Meyer acted under duress which was offered by Meyer's wife and mother; the credibility of witnesses is to be determined by the fact-finder. [8]

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[7] See Phillips v. United States, 334 F. 2d 589, 591 (9th Cir. 1964) (defining coercion, compulsion and necessity).

[8] Research reveals no federal case on the question of coercion or duress under Rule 43. In Massey v. State, 31 Tex. Cr. 371, 20 S. W. 758 (1892), a defendant was moved to another

(Continued)

C. A MISSTATEMENT OF EVIDENCE BY THE PROSECUTOR WAS NOT PREJUDICIAL.

Meyer contends that the Assistant United States Attorney's reference in argument to Meyer's 1962 arrest for obtaining money by false pretenses was such a misstatement of the evidence as to be plain error. The only evidence regarding the arrest was that it involved an oil venture in Michigan [R. T. at 2182].

On direct examination, co-defendant Murphy testified that Meyer had been arrested in 1962 and that Meyer told him (Murphy) that it was a mistake, that it was Meyer's father whom the police intended to arrest [R. T. 2096-2099].

On cross-examination, the government showed Murphy a newspaper clipping to refresh his memory about the incident. Murphy silently read the article which apparently referred to the charges of obtaining money by false pretenses. The judge excluded the newspaper from evidence and carefully instructed the jury to disregard the showing of the newspaper [R. T. 2187]. Murphy stated again that Meyer told him the trouble involved Meyer's father and that an oil venture in Michigan was involved [R. T. 2188].

8/ Continued:

county for fear that his jail cell would be attacked by a mob. The judge and county attorney advised the defendant to waive his right to be present at his trial. The court held that his waiver was invalid. In Vecks v. State, 42 Ga. App. 451, 156 S. E. 729 (1931) the defendant's absence, as a result of threats made on his life, was determined to be voluntary and his conviction was affirmed.

The prosecutor mentioned in argument that Meyer was arrested for obtaining money by false pretenses [R. T. 2377, 2348]. In response to Meyer's objection, the court stated that there was no evidence with respect to obtaining money by false pretenses, but only that Meyer had been arrested in connection with an oil venture. Meyer did not move for a mistrial [R. T. 2348].

The test to be applied is whether the prosecutor's misstatement was so prejudicial that defendant was denied a fair trial. Isaacs v. United States, 301 F. 2d 706 (8th Cir. 1962), cert. denied, 371 U. S. 818 (1962); United States v. Davis, 260 F. Supp. 1009 (D. C. Tenn. 1966), aff'd., 365 F. 2d 251 (6th Cir. 1966).

In this connection some latitude is allowed counsel in argument, unless the statements are untruthful or plainly prejudicial. United States v. Mucherino, 311 F. 2d 172 (4th Cir. 1962); See United States v. Barrett, 280 F. 2d 889 (2nd Cir. 1960). Only in cases of clear abuse by a prosecutor will a conviction be set aside because of improper argument. Cf. United States v. Redfield, 197 F. Supp. 559 (D. C. Nev. 1961), aff'd., 295 F. 2d 249 (9th Cir. 1961), cert. denied, 369 U. S. 803 (1962) ; Brennan v. United States, 240 F. 2d 253 (8th Cir. 1957), cert. denied, 353 U. S. 931 (1957); Weiss v. United States, 122 F. 2d 675, 690 (5th Cir. 1941), cert. denied, 314 U. S. 687 (1941); D'Aquino v. United States, 192 F. 2d 338 (9th Cir. 1951), cert. denied, 343 U. S. 935 (1952). (These cases involve inflammatory remarks by the prosecution.)

Wigmore explains that:

> [S]ince misunderstandings constantly arise as to the tenor and effect of evidence, and since in the strain and fervor of argument honest errors of memory may easily occur, improper assertions may come to be made unwittingly. For such contingencies, on the one hand, judicial charity should be shown in excusing the counsel from the guilt of knowing misconduct. * * * Wigmore, Evidence §1807, p. 264 (3d. Ed. 1940).

The instant case falls within the category of cases cited above. Although the newspaper clipping was shown to Murphy in front of the jury, the court instructed the jury to disregard it [R. T. 2187]. There is no reason to presume that the jury did not follow that instruction. See Nabob Oil Co. v. United States, 190 F.2d 478, 481 (10th Cir. 1951), cert. denied, 342 U.S. 876; Kowalchuk v. United States, 176 F.2d 873, 877 (6th Cir. 1949).

Additionally, at the prosecutor's request [R. T. 2192], the judge instructed the jury that the testimony concerning Meyer's arrest was not evidence on the guilt or innocence of any of the defendants, but that it was admitted only for consideration on the issue of whether Murphy and Kvasnicka relied in good faith upon the representations Meyer made involving his oil ventures [R. T. 2195]. Also, the trial court corrected the slight misstatement by the prosecutor and informed the jury as to the correct state of the evidence [R. T. 2348]. Finally, the misstatement of fact was

slight compared to the amount of evidence offered in this lengthy, complicated trial, and the evidence against Meyer was overwhelming.

It is fundamental that the government must prosecute upon the highest level of fair play; however, a prosecutor's slight oversight should not frustrate the administration of justice. See Lewis v. United States, 277 F. 2d 378 (10th Cir. 1960), sub nom, Burley v. United States, 295 F. 2d 317 (10th Cir. 1961).

Parker v. Gladden, 385 U.S. 363 (1966), relied upon by Meyer is entirely distinguishable on its facts. In Parker, the bailiff of the court commented that the defendant was guilty and a wicked man. This comment was overheard by three jurors. Because of the bailiff's official status, his opinion probably weighed heavily with the jury, and there was evidence that one of the jurors was prejudiced by the bailiff's statements. The court held that these facts raised such a probability of prejudice that the defendant was denied due process of law. Obviously, the facts before this Court do not present such a probability of prejudice.

Rule 52(a) of the Federal Rules of Criminal Procedure provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The prosecutor's misstatement of the evidence in the context of this case falls squarely within Rule 52(a) and was therefore harmless.

CONCLUSION

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted,

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